No. 239.

Brief of Cooper & Cooper for Def'

Filed May 20, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 239.

JAMES JOHNSON, PLAINTIFF IN ERROR,

vs.

GEO. F. DREW, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

C. M. COOPER,
J. C. COOPER,
Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 239.

James Johnson, Plaintiff in Error,
vs.
George F. Drew, Defendant in Error.

In Error to the Supreme Court of the State of Florida.

Statement.

This is a writ of error allowed by the Chief Justice of the Supreme Court of Florida, and which writ was issued by the Deputy Clerk of the Circuit Court of the United States for the *Southern District of Florida* (See pages 72 and 72 of Record), and is directed to the Judges of the Supreme Court of the State of Florida to bring up a certain cause determined in that Court on the 19th of July, 1894.

The writ should be dismissed.

This writ of error is issued by E. O. Locke, Clerk of the Circuit Court of the United States for the *Southern* District of Florida, by H. L. Crane, *Deputy Clerk.* (See page 72 of Record.) The Supreme Court of the State of Florida sits in the City of Tallahassee, State of Florida, as provided by the laws of said State.

See Section 1311 Rev. Stat. of Fla., as follows:

"The Supreme Court shall hold two terms in each year, in the Supreme Court room in the capitol, commencing respectively on the second Tuesday in January and June. The Court may adjourn from time to time, as may be deemed necessary for the dispatch of business."

The capital of the State is the city of Tallahassee. The city of *Tallahassee* is in the County of Leon, and within the Northern District of Florida. The State of Florida is divided into two districts.

See Chap. *280*, U. S. Stat. Vol. 20, Rev. Stat. See 534 Chap. 149, 28 Stat. U. S., page 117 (1893-1894).

The Deputy Clerk of the United States Circuit Court for the Southern District of Florida, had no power or authority to issue this writ directed to the Judges of the Supreme Court of the State of Florida.

This writ of error should have been issued by the Clerk of the Supreme Court of the United States, or if the act of Congress applies, it should have been issued by the Clerk of the Circuit Court for the *Northern* District of Florida, within which the Supreme Court of the State of Florida sits and its records are kept, to-wit, in the City of Tallahassee, Florida, the Capital of the State.

The Deputy Clerk of the Circuit Court of the United States, to-wit, H. L. Crane, had no authority to issue a writ of error. The act of Congress in such cases only authorizes the *Clerks* of the Circuit Court to issue writs of error as the writs of the Supreme Court of the United States.

For the reasons stated, to-wit, that this writ of error was issued by the *Deputy Clerk*, and that such *Deputy*

Clerk was a Deputy Clerk of the United States Circuit Court for the *Southern* District of Florida, while the Supreme Court of the State of Florida and its records are located within the Northern District of Florida, we submit the writ of error in this cause should be quashed as not having been properly issued.

STATEMENT OF THE CASE.

This was an action of ejectment brought in the Circuit Court for the Sixth Judicial Circuit of the State of Florida, Hillsborough County, in which the defendant in error, George F. Drew sued James Johnson, plaintiff in error, in ejectment, to recover possession of a certain tracts of land, described in the complaint as lot eight of Section nineteen, Township 29 south, Range 19 east, and lot 7 of section 24 in Township 29 south, range 18 east. (See page 2 of the Record.)

The defendant, by his attorneys, filed two pleas; first, the plea of not guilty, and second, an alleged plea upon equitable grounds. (See page 3 of Record.)

The defendant in error, plaintiff below, demurred to the so-called equitable plea (See page 4 of the Record). This demurrer was sustained by the State Circuit Court (See page 8 of the Record).

The defendant sought to file a so-called amended plea upon equitable grounds (See pages 5 and 6 of Record). Leave to file this plea was denied, on the ground that it is not sufficient as a plea upon equitable grounds

(See page 7 of the Record). Two of the grounds of the demurrer on page 4 of the Record, to the original so-called plea on equitable grounds, were that the plea did not show any ground for the interposition of a court of equity in his behalf.

The cause was thereupon tried upon the defendant's plea of "not guilty." The plaintiff proved title to the land in controversy by introducing in evidence a patent from the United States to Louis J. Brush (Found on pages 14 and 15 of the Record), and by deed from Louis J. Brush and wife to the plaintiff (Found on pages 16 and 17 of Record).

The defendant offered in evidence what purported to be correspondence of officials in the War Department of the United States in reference to certain lands referred to in the correspondence as the Fort Brooke Reservation in Florida. The defendant nowhere proved that the land in question was any part of this Reservation. The defendant appears to have offered in evidence an alleged diagram showing the lands consequent upon the restoration to the public domain of a portion of the Fort Brooke Military Reservation, but the alleged diagram was not certified under the seal of any office, nor the signature of the official who purported to certify to same proven, and the same was not allowed to be introduced in evidence (See pages 24 and 25 of the Record).

The defendant then sought to show by certain witnesses, including the plaintiff (whose testimony is found on pages 25 to 33 of the Record), that the defendant had been living on the lot in question before the patent from the United States to plaintiff issued. The defendant did not show any claim of right or title under which he went into or held such possession. The only testimony attempting to prove any effort of the defendant to claim

under any law of the United States is that of the witness Chamberlain (found on page 26 of the Record), which is simply a vague, indefinite statement that at some time, which is not identified, the defendant made some sort of effort to secure an application for the land. What the effort was is nowhere stated in the testimony.

All of this evidence as to alleged possession anterior to the date of the patent properly was ruled out on the ground that the questions addressed to the witness called for their opinions as to the nature of the plaintiff's claim of possession, and as to the alleged attempt at a settlement upon the land made by the defendant, and because defendant had not shown, or offered to show, that he was upon the land under any specific claim of title, and because the defendant had not shown by any legal proof any effort to enter the land or acquire title to the land under any law of the United States, or settle upon the same for the purpose of obtaining any homestead, or other right under the laws of the United States upon this land.

The testimony elicited was purely of a bare possession of a part of the land by the defendant, when the title to same was in the United States, and down to the issue of the patent to plaintiff's grantor Brush, on the 30th of September, 1882. Judgment was entered in the Court below for the plaintiff. The defendant below as the plaintiff in error in this Court, took a writ of error to the State Supreme Court of Florida. The Supreme Court of Florida, on the 19th of July, 1894, affirmed the judgment of the Court below and rendered its opinion in the cause (found on pages 54 and 55 of the Record). From this writ of error the defendant below, who is plai
error here, obtained the alleged writ of error in thi
and brought the Record here.

There is no Federal question involved in this case.

An examination of the questions arising on the trial in the State Circuit Court, and passed upon by the Supreme Court of the State of Florida, will show that there is no question necessarily presented in the Record on account of which, under the Acts of Congress, this Court is required to review the decision of the Supreme Court of the State of Florida.

This writ of error is attempted to be prosecuted here by virtue of section 709 of the U. S. Rev. Stat. Under the act of Congress referred to it should distinctly appear that the plaintiff in error had some definite, distinct title or right under the Constitution or Statutes of the United States, and the decision of the Supreme Court of Florida must distinctly appear to have been against the said title or right of the plaintiff in error, and that such title depended upon the statute of the United States referred to.

It should also appear that this right, title or privilege claimed by the plaintiff in error under such statute of the United States was distinctly set up by him in the State Courts, and that the decision was adverse to it in the State Courts.

New Orleans Waterworks Co. vs. La. Sugar Ref. Co., 125 U. S., 18.

De Saussure vs. Gaillard, 127 U. S., 216.

Hale vs. Akers, 132 U. S., 554.

San Francisco vs. Itsell, 133 U. S., 65.

Missouri vs. Andriano, 138 U. S., 497.

Ryan vs. Thomas, 4 Wallace, 603.

The claim under the statutes of the United States must have been distinctly raised in the Court below.

Hoyt vs. Sheldon, 1 Black, 518.

R. R. Co. vs. Rock, 4 Wall., 177.

Spies vs. Illinois, 123 U. S., 131.

French vs. Hopkins, 124 U. S., 524.

No claim or right by the defendant below under the Constitution or laws of the United States.

It will be seen by a careful examination of the testimony offered by the defendant below that he did not anywhere show that he claimed a right of homestead entry, or any other right in the land in question under any law of the United States.

The Supreme Court of the State of Florida, in its opinion (see page 61 of Record) states that "There was no effort to show that the defendant had ever obtained any certificate of entry of the land from the land office, or that he had any deed or paper evidence of title of any kind to the land from any source whatever."

Further (on page 62 of the Record), the Supreme Court of the State of Florida states: "In the case before us there was no showing that the land occupied by the defendant was ever subject to entry under any of the public land laws by homestead entry, or that the defendant had acquired any right inchoate, or otherwise, to enter the land. Defendant's claim is not shown to have been in privity with the Government's title in any way, and his adverse holding, under the showing made, places him in the attitude of a mere trespasser upon the land."

The evidence offered by the defendant in the Court below, as found in the Record, sustains this finding of the Supreme Court of the State of Florida. The defendant only proved that he was upon the land.

No matter what the alleged objection made by the defendant to the patent from the United States to Brush, the grantor of the defendant in error, no question is presented for the decision of this Court, unless the plaintiff in error established in the trial below some right or claim *in himself*, distinctly set up and proven under the laws of the United States, and that the decision of the Supreme Court was against such right or claim. The defendant below, plaintiff in error here, has entirely failed in this record to distinctly point out or set up in the court below, or in the State Supreme Court on the record any definite right or claim that he might have to the land in question under the laws of the United States, and upon which the Supreme Court of Florida has rendered a decision against the said plaintiff in error. Therefore, we submit this Honorable Court should affirm the judgment of the Supreme Court of the State of Florida on this record, as presenting no question for the review of this Court.

The decision of the Supreme Court of the State of Florida does not necessarily depend on the determination of any Federal question.

The Supreme Court of Florida, in its opinion reviews the action of the Court below in sustaining the demurrer to the so-called equitable plea and in refusing to defendant below the right to file an alleged amended equitable plea.

Under the statutes of the State of Florida, in common law actions, a defendant who has some defense which would be good ground for maintaining a bill in equity to enjoin a judgment, already obtained, may set it up by way of what is termed an equitable plea.

The language of the statute of the State of Florida, section 1047, Rev. Stat. of Fla. is as follows: "The defendant in any cause in any of the courts of this State in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, may plead by plea or subsequent pleadings the facts which entitle him to such relief by way of defense."

An examination of the alleged equitable plea (found on page 3 of the record) and of the amended equitable plea (pages 5 and 6 of the record) will show that the matter therein contained was in no sense ground for equitable relief or proper matter to be pleaded as an equitable plea under the statutes of Florida. The substance of the matters contained in these pleas were that the United States had no authority to issue the patent to plaintiff, for reasons stated in the alleged equitable plea, and that the plaintiff was in possession of the land prior to 1877 and at the time of the passage and approval of an act of Congress approved July 5th, 1884, and that he claimed under that law to be entitled to make homestead entry of the land in question.

None of these matters were admissible under an equitable plea. If the plaintiff had shown himself by the evidence to be in position to attack the patent of the United States in an action at law, he could have done so under the plea of "not guilty." The decision, therefore, of the Supreme Court of Florida as to these pleas does not necessarily involve any Federal question, and does

uot necessarily depend upon the determination of any claim of the defendant below under any law of the United States.

Even if it appeared that the decision of the Supreme Court of Florida was adverse to the plaintiff in error upon two independent grounds, one of which is not a Federal question, to-wit as to the nature of defense under an equitable plea, this Court will affirm the judgment.

The Supreme Court of Florida held (See page 57 of the record) that the facts alleged in the plea must not make such a defense as is available to the defendant in common law action, as the Court in such case will be justified in refusing to allow the plea to be filed, or in striking it out, if filed, citing,

Dickinson vs. Gamble, 16 Fla., 687,

Spratt vs. Price, 18 Fla., 289,

Walls vs. Endell, 20 Fla., 86,

Johnston vs. Allen, 22 Fla., 224.

Again says the Court (on page 60 of the record) "Conceding that the defendant was in a position to attack the patent all the available defense sought to be set up by the equitable plea in our judgment, would in our judgment be relied upon as a legal defense under the general issue, and the Court did not err in refusing to allow such plea to be filed."

The decision of the Supreme Court of the State of Florida on the admissibility of evidence and on the charges of the Court do not necessarily decide against any claim of defendant below, plaintiff in error, under the laws of the United States. The substance of the decision is, that if the plaintiff in error had any claim under the

laws of the United States, he never showed, or attempted to show it, and therefore the evidence of possession, prior to the patent, was incompetent; and the evidence from the records of the War Department not having been connected with the land in question was incompetent.

The Supreme Court of Florida states, in its opinion, that there was no effort to show that defendant ever obtained any certificate of entry of the land from the Land Office, or that he had any deed or paper evidence of title of any kind to the land from any source. The Court further says (page 60 of the record), "There is doubt whether the documentary evidence offered by the defendant shows that the particular lots mentioned and described in the declaration were *in the Fort Brooke Reservation* when the patent was issued."

Reference to the record (page 24) will show that the alleged plat, offered to show that this land was within the reservation, was objected to on the ground that it was not properly certified, and there was no seal of office or proof of the signature of the officer purporting to certify to the plat; so that absolutely in this record there is no showing that the land in question was a part of the Fort Brooke Military Reservation, or that the defendant ever attempted, under the laws of the United States, to enter the land as homestead or to acquire title to same. There being this absence of proof, it is sufficient in order to sustain the opinion of the Supreme Court of the State of Florida, to hold that on questions of admitting or rejecting evidence, such evidence of possession of the defendant is not connected with any claim of title under the laws of the United States, or that the land is not shown to be a part of the Military Reservation. And further, as stated by the Supreme Court of the State of Florida, on page 62: "In the case before us there was no showing

that the land, occupied by the defendant, was subject to *entry under any of the public land laws for homestead entry*, or that the *defendant had acquired any right* inchoate or otherwise to enter the land. Defendant's claim is not shown to have been in privity with the Government's title in any way, and his adverse holding, under the showing made, places him in the attitude of a trespasser upon the land." Under all these circumstances, we insist that the judgment of the Supreme Court of Florida should be affirmed on the ground that its judgment did not necessarily involve any Federal question, and that its opinion may be based upon other propositions, not involved in passing upon any law of the United States, or any right under any law of the United States.

The Plaintiff in Error cannot attack the patent from the United States under which the Defendant in Error claims title.

The defendant in error seeks, in argument, to assert that the patent from the United States to Brush, under which defendant in error claims title (pages 14 and 15 of record), was issued without authority of law. The grounds of his attack on this patent are in substance that the patent is based on the Valentine scrip, and that such scrip could not be located on this land, because it is alleged (but not proven), that same was a part of what is termed Fort Brooke Military Reservation, and that the entries did not conform to the surveys of the General Government, and further that the land was not unoccupied land but was occupied, meaning thereby the alleged occupation thereof by the plaintiff in error.

The plaintiff in error had no title of interest in, or possession of, the land, which the United States was bound to recognize in issuing a patent, and therefore the plaintiff in error is not in a position to attack the action of the United States in issuing such patent and cannot raise these questions. The Supreme Court of Florida, speaking of this part of the case, says (on page 62 of the Record) that "At most the plaintiff in error was an occupier of lands of the United States, without any right of entry, and without any authority of law." The Court further, in its opinion, states: "We have been unable to find any authorities to sanction the view that a mere trespasser upon public lands has the right to question the legality of a patent issued by the United States land officer," and cites thereto

Cooper vs. Roberts, 18 How. 173.

Doll vs. Meador, 16 Cal. 295.

The court also distinguishes the cases cited by the plaintiff in error, particularly Doolan vs. Carr, 125 U. S. 618, and Reynolds vs. Iron Silver Mining Co., 116 U. S. 687.

In the case of Doolan vs. Carr, 125 U. S. 618, the defendants had entered upon the land under a claim of pre-emption and settlement, and had made and subscribed a declaratory statement of intention to pre-empt the land and presented them to the Register of the local land office, but they were refused on the ground that the land had been patented to a railroad company.

In the case at bar it does not appear that the plaintiff in error ever filed any application to enter this land, or declaratory statement, or other paper in the land office of the United States, or took any action under the laws of the United States (which the Government was called

upon to recognize), looking to entering of this land, or to claim possession under any law of the United States. Therefore he cannot be heard to question the action of the United States Land Department in issuing the patent in question.

If the plaintiff in error showed anything by his proof offered of correspondence between the War Department and the General Land Office it would show that from the time plaintiff claims to have entered upon the land in July, 1871, down to January 4th, 1883, said plaintiff in error was a mere trespasser upon a Military Reservation, in which he could not possibly obtain homestead rights, or any right of entry.

Without some positive showing upon the record of plaintiff in error of having acquired some rights in the land, this Court will presume that the officers of the Interior Department acted within their authority in issuing the patent in question.

See authorities hereafter cited, on the point of collateral attacks upon a patent issued by the United States.

Attacks upon the patent under which defendant in error claims title.

If the Court shall reach the conclusion that the plaintiff in error may question the propriety and authority of the Interior Department in issuing this patent, we insist that none of the attacks attempted to be made upon the patent are well taken, and that none of them are sustained by the testimony contained in the record. There was no showing whatever that the lands in question were in fact within the Fort Brooke Military Reservation.

There was no competent evidence that the lands covered by the patent *had not been properly transferred by the War Department to the Interior Department before the patent in question issued.* The patent alone would afford *prima facie* evidence that the proper transfer had been made before the issuance of the patent. The correspondence offered in evidence would only show that some land, known as the Fort Brooke Military Reservation, was transferred on January 4th, 1885, by the Secretary of War to the General Land Office. There is no evidence in the record that the portion of Fort Brooke Military Reservation *included in this patent* was not, previously to June 4th, 1883, transferred to the Indian Department. If it was, and without evidence to the contrary, the issuing of the patent is *prima facie* evidence of such transfer, then the Interior Department had full power to allow the entry of the Valentine scrip upon said land and to issue a patent for same, under the provisions of the act of Congress of August 18th, 1856 (11. Stat. L., page 87).

This act provides for the sale and disposition of the lands reserved for military purposes in the State of Florida, and provides that they shall be sold and disposed of in the same manner and under the same regulations as other public lands of the United States, and further provides for the transfer of same from the War Department to the Department of Interior. Under the terms of this act, at the date of the patent in question, to-wit, on the 30th of September, 1882, the Interior Department had full power and authority to allow the entry of said land by Brush, and to issue patent to said Brush, if the lands had been transferred to the Interior Department. This Court will presume that they had been.

The further objection made to this patent is that the lands were not unoccupied, and in the motion for a new

trial of plaintiff in error, in the State Court, under the fifth ground (page 40 of the record), the plaintiff in error claims that the lands were not unoccupied, but were in the *occupancy of the defendant*, to-wit, of plaintiff in error. It will be seen from the testimony of the defendant below, that what he meant by occupied land was that he was in the occupancy of same, and therefore it could not be entered with Valentine scrip.

Unoccupied lands, within the meaning of the land laws of the United States, means lands that are not occupied by persons claiming under same *right or title recognized by the United States;* it does not refer to mere occupancy by a trespasser or by a person with no claim or right in the land. These lands, according to the showing of the plaintiff in error himself, were unoccupied lands, in the meaning of the law. The occupancy of the plaintiff in error, he having made no effort whatever at the land office to enter the land or taken any action recognized by the United States, did not constitute the lands occupied within the meaning of the law. The United States Land Office did not know, and were not called upon to know, that the defendant was on the land, or claimed any interest in it. They were authorized to allow the entry of Brush and to issue patent to Brush, as against the plaintiff in error, because he had no *status*, as to the land, justifying the officers in considering or recognizing him in the matter in any way whatever.

As to the question of surveys, or whether the land was made to conform to the surveys of the United States, all of these questions in reference to surveys belong exclusively to the Land Department and cannot be raised in collateral attack against the patent.

See Cragin vs. Powell, 128 U. S., 691.

Knight vs. U. S. L. Ass'n, 142 U. S., 161.

As to all of these questions attempted to be raised in argument by the plaintiff in error against the issuance of the patent, we insist that the principle that a patent of the United States is the highest evidence of title and cannot be attacked collaterally by a third party, should be strictly applied. This Court has so held in a number of cases. It was a question of fact in this case as to whether these lands were occupied or unoccupied, and it was a question of fact as to whether these lands had ever been included in the Fort Brooke Military Reservation, and whether or not they had been transferred by the War Department to the Interior Department. It was also a question of fact as to whether the lands were made to conform to the official surveys. The Land Department had jurisdiction to determine these facts, and the issuance of the patent was evidence that, if these lands were ever in the Fort Brooke Military Reservation, they had been transferred by the War Department to the Interior Department. As to the questions of survey and occupancy, the patent certainly cannot be attacked collaterally in any action of ejectment, on those matters.

See Steele vs. St. Louis S. & R. Co., 106 U. S. 447.

Sioux City L. Co. vs. Griffey, 143 U. S. 32.

St Louis, S. & E. Co. vs. Kemp, 103 U. S. 636.

Baldwin vs. Stark, 107 U. S. 463.

Knight vs. U. S. L. Assn., 142 U. S. 161.

Heath vs. Wallace, 138 U. S., 573.

Hardin vs. Jordan, 143 U. S., 371.

Lee vs. Johnson, 116 U. S., 48.

Johnson vs. Towsley, 13 Wall., 73, 83.

French vs. Fyan, et al., 93 U. S., 169.

Wright vs. Roseberry, 121 U. S., 488.

The land in question not shown to be subject to entry by plaintiff in error.

The plaintiff in error in argument seeks to claim some right or interest in the land under the provisions of the United States Statutes, to-wit, acts of 1884, chapter 214. *This was an act passed after the issuance of the patent in question* providing for the disposition of lands reserved for military purposes in the State of Florida. It contained a proviso, in reference to occupants who were upon the land in good faith for the purpose of entering the same under the general law, and provided further that the said lands were *subject to entry under the public land laws at the time of their withdrawal.* Chap. 214, Acts of 1884.

The Supreme Court of the State of Florida very properly determined, as to this branch of the case, that the pleas offered contain no allegation that the land was subject to *entry under the public land laws at the time of its withdrawal,* and further (on page 62 of the Record) that there was no showing made that the lands in question were ever subject to *entry under any of the public land laws when withdrawn for a Reservation.*

As we have stated above, the proof in the case is wholly defective in showing that the lands covered by the patent ever were in Fort Brooke Military Reservation, and wholly defective in showing by any competent proof,

when they were withdrawn, or when they were restored, if ever restored, except that the patent is *prima facie* evidence that if these lands ever were a part of the military reservation they were restored to the Land Department before the issue of the patent.

It was incumbent upon the plaintiff in error attacking this patent to show that the land in question was of a character that made it subject to entry at the time that they were *first withdrawn* and created a part of the Fort Brooke Military Reservation, in order to claim that the said Act of 1884, affected said lands. The copies of the correspondence offered in evidence by the plaintiff in error do not fix when the lands in question were first withdrawn and created a part of the Fort Brooke Military Reservation, or the status of the lands at that time. The correspondence referred to begins with a letter dated July 24th, 1860, from the then Secretary of War to the Secretary of Interior, simply stating that the Fort Brooke Military Reservation is then in readiness to be turned over to the Department of the Interior. The next document is a letter from the Secretary of War, dated April 6th, 1870, to the same effect. The next is a letter dated January 4th, 1883, from the Secretary of War to the Secretary of Interior, relinquishing and transferring certain lands at that time the Military Reservation of Fort Brooke, Florida. Whether or not these lands had before that time been transferred to the Interior Department under the act of 1856 is not shown, or what the status of the lands covered by the patent were at the date of the letter of February 4th, 1883.

Certain other correspondence on pages 22 and 23 of the Record and orders of the President, dated respectively January 22nd, 1877, and May 29th, 1879, apparently cut down the previous reservation at the post of Fort

Brooke, Tampa, Florida, and prescribe new boundaries of same. None of these orders and letters in terms are shown to cover the land in question, and if anything is shown by this proof it is that Fort Brooke Military Resvation had in fact existed for many years before, and that the lands in question were never subject to entry, and therefore that the Act of Congress of 1884 did not apply to them.

Certain it is that there was no showing by the defendant in the court below as to when the original reservation was created, or that at the time of creating the original reservation it included the land in question, or that if it did include the land in question *that said lands were subject to entry.*

Unless all these facts were proven as against the patent issued by the Government of the United States, the defendant did not show that he could acquire any right in this land under the said act of Congress of 1884.

All of the authorities referred to by the plaintiff in error in his brief are cases in which the entry-man had taken action in the Land Department himself to enter the land and are cases where it was shown that the land was subject to entry at the time he took such action, but the plaintiff in error did not bring himself within either of these conditions, and therefore the authorities cited by the plaintiff in error do not apply to the facts of the case at bar.

The defendant in error, the plaintiff below, was entitled to recover the land sued for on the patent and his deed from Brush, the grantee in the patent. The plaintiff in error, defendant below, did not show himself to have any right, title, or interest in the land, except a claim of bare possession, and therefore as against the pat-

ent he could not be permitted to continue to hold possession of the lands in controversy.

The Court below did not err in refusing to give the charges asked by the defendant. The Supreme Court of Florida in this case determined, on page 63 of the Record that, "There was no testimony before the jury to authorize the charges requested by the defendant and refused." This being true there is no Federal question for this Court to review on the charges asked by the defendant below and refused. If, however, this Court shall determine that it ought to examine the charges, we submit that they do not state the *law of this case*, and were properly refused. The same argument as to the evidence and pleas offered apply to the charges. The defendant did not bring himself within the provisions of the law stated in his charges. He was not a homesteader, or an entryman under the homestead laws of the United States at the time of the issuing of the patent. He did not show any of the facts as to the land in question that would make the act of Congress of 1884 apply to said lands. He did not show any facts to sustain his objections to the patent issued to Brush, the grantor of defendant in error.

For these reasons we insist that the judgment of the State Court in favor of the defendant in error, as plaintiff, and the judgment of the Supreme Court of the State of Florida affirming said judgment of the lower court, were correct and ought not to be disturbed or reversed by this Honorable Court.

C. M. Cooper
J. C. Cooper

Attorneys and Counsel for Defendant in Error.